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**JUDGE SONIA SOTOMAYOR'S RECORD ON
CONSTITUTIONAL PROPERTY RIGHTS**

**SUPPLEMENTAL TESTIMONY BEFORE THE
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY**

**ANSWERS TO WRITTEN QUESTIONS POSED BY RANKING
MEMBER SENATOR JEFFERSON SESSIONS, SENATOR CHARLES
GRASSLEY, AND SENATOR ORRIN HATCH**

JULY 19, 2009

INTRODUCTION.

I am very pleased to have the opportunity to supplement my testimony on the important constitutional property rights issues raised during the course of Judge Sonia Sotomayor's confirmation hearings for the position of associate justice of the United States Supreme Court. I am also grateful to ranking member Senator Jefferson Sessions and Senators Charles Grassley and Orrin Hatch for their insightful questions focusing on Judge Sotomayor's decision in *Didden v. Village of Port Chester*¹ and her testimony *Kelo v. City of New London*.²

In this supplemental testimony, I explain why Judge Sotomayor's testimony before this Committee failed to justify her Second Circuit panel's flawed decision rejecting property rights claims in *Didden*. Responding to questions by Senator Grassley and Senator Herb Kohl, she also misstated some key aspects of the Supreme Court's decision in *Kelo*. The misstatements tended to downplay the sweeping nature of the Court's ruling.

I. ANSWERS TO QUESTIONS POSED BY RANKING MEMBER SENATOR SESSIONS.

A. What are the implications of Judge Sotomayor's decision in the *Didden* case for property rights under the Constitution?

¹ 173 Fed. Appx. 931 (2d Cir. 2006).

² 505 U.S. 469 (2005).

Didden will have little direct effect on property rights because, as an unpublished summary order, it is not binding precedent in the Second Circuit and the Circuit's rules forbid citation of unpublished summary orders filed before 2007.³ However, *Didden* was a case with such extreme facts that if a court is not willing to hold that there was a "pretextual" taking there, it is difficult to believe that it would find one anywhere. If the approach adopted by the *Didden* panel were to be accepted by the Supreme Court, it would make it virtually impossible to challenge any condemnation under the Public Use Clause of the Fifth Amendment.⁴ The Supreme Court's decision in *Kelo* held that any condemnation that the government asserts might serve a "public purpose" is permissible.⁵ Only "pretextual" takings, where the official rationale is "a mere pretext" for a scheme "to bestow a private benefit,"⁶ can still be invalidated. But if a court is unwilling to conclude that even a condemnation undertaken because the owners refused to pay a large sum of money to private party is pretextual, then the last remaining vestige of protection for property owners will have been gutted.

B. Does *Didden* fall into the mainstream of takings law or is it an aberration?

The law of pretextual takings is still in flux in the wake of *Kelo*. It is difficult to say what the consensus mainstream view will be when it and one emerges.⁷ However, to my knowledge, no other federal court has upheld a potentially pretextual condemnation in circumstances as extreme as those of *Didden*. Both before and after *Kelo*, several federal courts have invalidated takings as pretextual in cases with considerably more ambiguous facts, or at least refused to rule in favor of the government without a detailed inquiry into the allegations of pretext.

In *Kelo* itself, the Court cited the 2001 California district court case of *99 Cents Only Stores v. Lancaster Redevelopment Agency* as an example of a pretextual taking that was properly invalidated.⁸ For reasons discussed in my original written testimony, *99 Cents* was a much less extreme case than *Didden*.⁹

In *Armendariz v. Penman*, a leading pre-*Kelo* case, the Ninth Circuit invalidated as pretextual a condemnation where low-income housing was taken for the purpose of building a shopping mall.¹⁰ The City of San Bernardino claimed that its objective was to promote "the reduction of urban blight."¹¹ But the Ninth Circuit refused to defer to the City's assertion because the

³ See Second Circuit L.R. § 32.1(c).

⁴ This issue is discussed in greater detail in my original testimony. See Ilya Somin, *Judge Sonia Sotomayor's Record on Constitutional Property Rights*, Testimony before the United States Senate Committee on the Judiciary, July 16, 2009, at 6-7 [hereinafter, Somin, *Testimony*].

⁵ *Kelo*, 545 U.S. at 473-88 (holding that any potential "public purpose" counts as a "public use," and that the government is not required to prove that the "expected public benefits" will actually be achieved).

⁶ *Id.* at 478.

⁷ For an excellent discussion of the relevant cases and alternative approaches to the issue, see Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173 (2009).

⁸ *Id.* at 487 n. 17 (citing *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003)).

⁹ Somin, *Original Testimony*, at 6-7.

¹⁰ 75 F.3d 1311 (9th Cir. 1996) (en banc).

¹¹ *Id.* at 1314.

evidence indicated that this rationale was a mere pretext for “a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price.”¹² Unlike in *Didden*, there was no evidence in *Armendariz* that the condemnations were undertaken because the owners had refused to pay money to a private party. And the new owners’ planned use for the property was different from the old one, and could potentially have provided some public benefits in the form of alleviating blight or promoting development. By contrast, developer Gregg Wasser planned to use the condemned property in *Didden* for essentially the same purposes as Bart Didden and Dominick Bologna – establishing a drug store.¹³

Three United States district court decisions, including the *99 Cents* decision favorably cited by the Supreme Court in *Kelo*, have since relied on *Armendariz* and refused to defer to pretextual takings that transfer condemned property to private interests.¹⁴ In these cases, too, there was no allegation that the condemnation was enacted because the owners refused to pay money to a private party, and the new owners’ planned use for the land was less similar to the original owners’ plans than in *Didden*. Similarly, in the post-*Kelo* case of *MHC Financing Ltd. P’ship v. City of San Rafael*,¹⁵ the federal district for the Northern District of California interpreted *Kelo* as requiring “a careful and extensive inquiry” into the question of whether a private-to-private taking was actually adopted for the purpose of benefiting a private party.¹⁶

In *Franco v. National Capital Revitalization Corporation*, the District of Columbia sought to condemn a Discount Mart store and transfer it to a group of private developers who planned to build a “mixed use retail center.”¹⁷ The Court of Appeals for the District of Columbia emphasized that “*Kelo* makes clear that there is room for a landowner to claim that the legislature’s declaration of a public purpose is a pretext designed to mask a taking for private purposes.”¹⁸ The *Franco* decision remanded the case to the trial court to consider evidence submitted by the owner that suggested that the official rationale for the taking was a pretext for a scheme to provide private benefits to the new owners. It noted that “[i]f the property is being transferred to another private party, and the benefits to the public are only ‘incidental’ or ‘pretextual,’ a ‘pretext’ defense may well succeed.”¹⁹ In *Didden*, of course, the taking would not have occurred but for Didden and Bologna’s rejection of Wasser’s demand that they pay him \$800,000 or give him a 50 percent stake in their business. And any possible

¹² *Id.* at 1321.

¹³ Somin, *Original Testimony*, at 7.

¹⁴ See *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev’d on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) (“Courts must look beyond the government’s purported public use to determine whether that is the genuine reason or if it is merely pretext.”); 99, 237 F. Supp. 2d at 1129 (holding that “[n]o judicial deference is required . . . where the ostensible public use is demonstrably pretextual.”).

¹⁵ 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006).

¹⁶ *Id.* at *14 (quoting *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring)).

¹⁷ *Franco v. Nat’l Capital Revitalization Corp.*, 930 A2d 160, 162-63, (D.C. 2007). The D.C. Court of Appeals is the highest court of the District of Columbia, and should not be confused with the U.S. Court of Appeals for the D.C. Circuit.

¹⁸ *Id.* at 171.

¹⁹ *Id.* at 173-74.

public benefits were likely to be minor or nonexistent, given that he intended to use the property for essentially the same purpose as they did.

Finally, it is worth noting that the Supreme Court of Pennsylvania has interpreted *Kelo*, in conjunction with its own previous precedents, as requiring “some substantial and rational proof by way of an intelligent plan that demonstrates informed judgment to prove that an authorized public purpose is the true goal of the taking.”²⁰

Obviously, proving a pretextual taking claim under *Kelo* is difficult. In the vast majority of cases, the purposes underlying a taking are ambiguous enough that the government is likely to prevail even if the circumstances of the condemnation are suspicious.²¹ That said, no other federal court has, to my knowledge, upheld a pretextual condemnation as blatant as that allowed by the Second Circuit in *Didden*.

C. Is Judge Sotomayor’s ruling in *Didden* consistent with the Supreme Court’s decision in *Kelo v. City of New London* or is it an overreach by a judicial activist?

For reasons discussed in my original testimony, I believe that *Didden* upheld a condemnation that was precisely the sort of “pretextual” taking that the *Kelo* majority indicated is forbidden.²² At the very least, the *Didden* panel should have carefully the pretext question and the potential relevance of *Kelo* instead of disposing of this important constitutional issue in an unpublished summary order with almost no analysis.

In my view, the phrase “judicial activism” is overused and is often employed as just a synonym for any ruling one considers to be incorrect.²³ I am, therefore, reluctant to apply a phrase whose utility I have previously questioned. Whether or not *Didden* should be considered an “activist” ruling, it is certainly a deeply flawed decision that upheld an unusually flagrant violation of constitutional property rights.

D. In *Didden*, did Judge Sotomayor eliminate the one important opportunity for aggrieved property rights plaintiffs to challenge a wrongful taking by eliminating their opportunity to challenge pretext?

The answer to this question is yes, subject to some minor caveats.²⁴ For reasons discussed above,²⁵ the Supreme Court’s decision in *Kelo v. City of New London* enables the

²⁰ *Middletown Twp. v. Lands of Stone*, 939 A2d 331, 340 (Pa. 2007).

²¹ See Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 233-240 (2007).

²² Somin, *Testimony*, at 6-7.

²³ See Ilya Somin, *How Useful is the Concept of “Judicial Activism”?*, Volokh Conspiracy weblog, posting of Ilya Somin, Nov. 1, 2007, available at http://volokh.com/archives/archive_2007_10_28-2007_11_03.shtml#1193970176.

²⁴ As discussed above, *Didden* lacks precedential effect because it was an unpublished summary order, and therefore cannot dictate the outcome of future cases. See § I.A, *infra*. However, I assume the question addresses the consequences of adopting the rule of *Didden* as binding precedent.

²⁵ See § I.A, *infra*.

government to condemn private property for virtually any reason except a pretextual one. But if the taking upheld in *Didden* is not considered pretextual, it is virtually impossible to imagine what would be. Thus, under *Didden*, government has virtually unlimited power to condemn property.

To be sure, property owners might still be able to challenge a taking successfully if the government failed to cite any "public purpose" at all to justify it. Similarly, they could prevail if the condemning authority actually admitted that the official rationale was a mere pretext for a scheme to benefit a private party. As a practical matter, however, it is highly unlikely that the government would be so foolish as to do either. Therefore, *Didden* seems to license virtually any abusive condemnation where the government is minimally savvy enough to cite some sort of public purpose rationale, even a highly transparent one.

II. ANSWERS TO QUESTIONS POSED BY SENATOR GRASSLEY

A. Professor Somin, have you had an opportunity to review Judge Sotomayor's responses to questions on the *Kelo* case? Do you have any concerns with her answers?

I have reviewed Judge Sotomayor's testimony on *Kelo* in response to questions posed by Senator Grassley and Senator Herb Kohl of Wisconsin. Unfortunately, Judge Sotomayor misstated the holding of *Kelo* in two significant ways, both of which tend to downplay the extent to which the Court's ruling endangered property rights.

In response to questioning by Senator Herb Kohl of Wisconsin, Judge Sotomayor incorrectly claimed that *Kelo* "held that a taking to develop an economically blighted area was appropriate."²⁶ In reality, both sides in the *Kelo* litigation agreed that the area in question was *not* blighted. As Justice John Paul Stevens noted in his majority opinion for the Court, "[t]here is no allegation that any of these properties [that were condemned] is blighted or otherwise in poor condition," and "[t]hose who govern the City [of New London] were not confronted with the need to remove blight in the Fort Trumbull area" where the condemned properties were located.²⁷

The absence of blight was precisely what made the *Kelo* case distinctive. It was the first Supreme Court decision to specifically address the question of whether property could be condemned and transferred from one private owner to another solely for purposes of "economic development" in a *non*-blighted area. The Court had already ruled that private-to-private condemnations in a blighted area are permissible in the 1954 case of *Berman v. Parker*.²⁸ *Berman* led to numerous abuses, including the condemnation of property under state statutes that define "blight" so broadly that almost any area can be declared "blighted"

²⁶ Transcript of Confirmation Hearing of Judge Sonia Sotomayor for the Position of Associate Justice of the United States Supreme Court, July 14, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071401250_5.html. Since I do not yet have access to the official hearing transcript, I have relied on the version available at the *Washington Post* website.

²⁷ *Kelo*, 545 U.S. at 475, 483.

²⁸ 348 U.S. 26 (1954).

and taken.²⁹ *Kelo* went even further, however, because there was no allegation of blight in the case. The Court ruled that even non-blighted property can be condemned and transferred to another private owner for “economic development” purposes. It is important to recognize that the *Kelo* Court did not limit “economic” development condemnations to areas where preexisting economic conditions are in any way substandard.³⁰ As Justice Sandra Day O’Connor pointed out in her dissenting opinion, under *Kelo* “nearly all real property is susceptible to condemnation” because it is always possible to argue that a given piece of land might be put to more productive use by some other owner.³¹

Judge Sotomayor’s second noteworthy misstatement of *Kelo* occurred during questioning by Senator Grassley, where she described the case as follows:

[T]he issue in *Kelo*, as I understand it, is whether or not a state who had determined that there was a public purpose to the takings under the — the takings clause of the Constitution that requires the payment of just compensation when something is — is condemned for use by the government, whether the takings clause permitted the state, once it’s made a proper determination of public purpose and use, according to the law, whether the state could then have a private developer do that public act, in essence. Could they contract with a private developer to effect the public purpose? And so the holding as I understood it in *Kelo* was a question addressed to that issue.³²

The problem with this answer is that *Kelo* did not simply hold that the state could “contract with a private developer to effect the public purpose” justifying a taking. It held that the state could actually *transfer ownership* of the land to a private party and that this was a constitutionally permissible “public use” if done for the purpose of promoting “economic development.” This is very different from simply hiring a private contractor to do work on public land, such as contracting with a private construction firm to build a publicly owned bridge. Moreover, the “contract” metaphor is misleading, since the new private owners of condemned land in economic development takings cases are generally not required by contract to actually provide the economic development that supposedly justified the condemnations in the first place.³³ This state of affairs greatly increases the risk of abuse, since both private interest groups and government officials are able to use inflated claims of economic benefit to justify a taking without fear that they will ever be required to provide the promised gains.³⁴

B. Have you reviewed Judge Sotomayor's testimony on the *Didden* case? Do you agree with it? Do you have any concerns with it?

²⁹ See Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42.

³⁰ The Court did take note of the City of New London’s judgment that the Fort Trumbull neighborhood was sufficiently “distressed” enough to require “redevelopment.” *Kelo*, 545 U.S. at 483. But the Court’s decision did not depend on that assessment.

³¹ *Id.* 504 (O’Connor, J., dissenting). Three other justices signed on to Justice O’Connor’s dissent.

³² *Transcript of Confirmation Hearing of Judge Sonia Sotomayor for the Position of Associate Justice of the United States Supreme Court*, July 14, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071402234_2.html

³³ Somin, *Controlling the Grasping Hand*, at 193-97.

³⁴ *Id.*

I have carefully considered Judge Sotomayor's testimony on *Didden*. Unfortunately, I cannot agree with her statements that "*Kelo* didn't control the outcome; the statute of limitations did" and that "the *Kelo* discussion didn't need to be longer because it wasn't the holding of the case."³⁵ As I explained in my original testimony,³⁶ Judge Sotomayor's panel clearly ruled on the substantive property rights issue as well. Their summary order specifically states that "[e]ven if Appellants' claims were not time-barred, to the extent that they assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district . . . , the recent Supreme Court decision in *Kelo v. City of New London* . . . obliges us to conclude that they have articulated no basis upon which relief can be granted."³⁷

In her testimony, Judge Sotomayor suggests that this discussion of *Kelo* was not part of the holding of *Didden*. However, the Supreme Court has specifically ruled that when a court has two alternative rationales for reaching the same result, both are part of the holding, not merely dictum.³⁸ Obviously, even if "the *Kelo* discussion" was mere dictum, it still reveals the panel's view of the property rights claim it addressed.

Moreover, as explained in my original testimony, the panel's statute of limitations ruling was not merely a technical procedural decision.³⁹ Rather, it was inextricably linked with their substantive conclusion that there is no meaningful difference between a claim challenging the declaration of a redevelopment area and one challenging a pretextual taking. The panel ruled that the property owners were required to file their case within three years after the declaration of the redevelopment area in 1999. However, there was no pretextual taking until they rejected Gregg Wasser's extortionate demands in November 2003, after which the property was condemned almost immediately.⁴⁰ Thus, the panel's statute of limitations ruling is based on an implicit substantive conclusion that the mere declaration of a redevelopment area legitimates any subsequent condemnation within its territory, even if that taking is clearly pretextual.

C. Do you believe that Judge Sotomayor will protect individual property rights if she is confirmed to be an Associate Justice on the Supreme Court?

As discussed in my original testimony, I believe that Judge Sotomayor's record suggests that she would provide solid protection for purely procedural property rights under the Due Process Clause of the Fourteenth Amendment.⁴¹ However, her ruling in the *Didden* case casts serious doubt on her willingness to protect the much more important substantive property

³⁵ Transcript of Confirmation Hearing of Judge Sonia Sotomayor for the Position of Associate Justice of the United States Supreme Court, July 14, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071402234_5.html.

³⁶ Somin, *Testimony*, at 8.

³⁷ *Didden*, 173 Fed Appx. 931, 933 (2d Cir. 2006) (emphasis added) (some citations omitted).

³⁸ See, e.g., *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) (holding that "[i]t does not make a reason given for a conclusion obiter dictum, because it is the only one of two reasons for the same conclusion").

³⁹ Somin, *Testimony*, at 8.

⁴⁰ *Id.*

⁴¹ *Id.* at 8-9.

rights guaranteed by the Takings Clause of the Fifth Amendment. For reasons explained above, the extreme nature of this ruling is troubling.⁴² If a judge is not willing to invalidate a condemnation undertaken because the owners refused to pay a large sum of money to a private party, it is unlikely that she would do so in less blatant cases. It is of course possible that Judge Sotomayor will reconsider her views on these matters if she has more time to think about them after confirmation. Otherwise, her appointment does not bode well for the future of substantive constitutional property rights protected by the Fifth Amendment.

III. ANSWERS TO QUESTIONS POSED BY SENATOR HATCH.

A. Is Judge Sotomayor's ruling in *Didden* consistent with the Supreme Court's decision in *Kelo v. City of New London*?

For reasons discussed above and in my original testimony, I believe that *Didden* upheld precisely the sort of pretextual taking that the *Kelo* Court considered to be forbidden by the Fifth Amendment.⁴³ At the very least, *Kelo* certainly did not "oblige" the Second Circuit panel to rule in the government's favor, as the summary order claimed.⁴⁴

B. Judge Sotomayor ruled that Didden's claim was time barred, do you agree? Didn't that ruling in effect say that Didden needed to file suit before his property was actually taken?

I strongly disagree with the Second Circuit panel's conclusion that Mr. Didden's claim was time-barred. As explained above and in my original testimony, the panel's statute of limitations ruling was based on the fallacious substantive conclusion that there is no meaningful difference between a claim challenging the mere declaration of a redevelopment area and one challenging a pretextual taking within a redevelopment area.⁴⁵

In addition, the panel's ruling that Didden and his fellow plaintiff Dominick Bologna were required to file their claims before their property was actually condemned creates a cruel Catch-22 dilemma. "[F]ederal courts are precluded from adjudicating a claim of a taking for a private purpose" unless the property owner has "demonstrate[d] that he or she received a 'final decision' from the relevant government entity."⁴⁶ If Didden and Bologna had filed a Takings Clause claim before their property was condemned, it would have been dismissed because it was not yet "ripe." In *Didden*, Judge Sotomayor's panel essentially ruled that New York property owners are not permitted to file a claim after a taking has actually occurred either, so long as the condemnation is undertaken more than three years after the redevelopment area is declared. It is surely both perverse and a violation of elementary

⁴² See §§ I.A, D, *infra*.

⁴³ See §§ I.A, D, *infra*; Somin, *Testimony*, at 6-7.

⁴⁴ *Didden*, 173 Fed. Appx. at 933.

⁴⁵ See § II.B, *infra*; Somin, *Testimony*, at 8-9.

⁴⁶ *Daniels v. Area Planning Comm'n*, 306 F. 3d 445, 454 (7th Cir. 2002).

principles of due process to rule that the government can immunize unconstitutional condemnations from legal challenge simply by crafty timing.

C. What effect do cases like *Kelo* and *Didden* have on the poor?

“Economic development” takings of the sort upheld in *Didden* often victimize the poor and racial minorities for the benefit of politically connected private interest groups, a point I emphasized in my original testimony.⁴⁷ This problem has been recognized by commentators and activists from various parts of the political spectrum. For example, the NAACP and Southern Christian Leadership Conference filed a joint amicus brief in *Kelo* urging the Supreme Court to forbid economic development takings in part because of their disproportionate negative impact on low-income minorities and other politically weak groups.⁴⁸

D. The briefs in the *Didden* case were filed prior to the *Kelo* decision being announced. The 2nd Circuit cited *Kelo*, but the parties were not asked to re-brief or re-argue the case in light of this new landmark precedent. Was this proper?

In my experience as a former law clerk on the United States Court of Appeals for the Fifth Circuit, the usual practice in such situations was to ask the parties to file supplemental briefs addressing the new Supreme Court decision. Based upon conversations with former Second Circuit clerks, I understand that the custom in that circuit is similar. Allowing the parties an opportunity to file supplemental briefs gives them a chance to consider the implications of the new decision and helps ensure that the panel takes proper account of it in its own ruling. The *Didden* summary order was not issued until some nine months after *Kelo* was decided on June 23, 2005. This would have allowed plenty of time for the filing of supplemental briefs.

At the same time, I am not aware of any rule requiring panels to request supplemental briefs. As far as I know, the *Didden* panel was within its discretionary authority when it chose not to do so. In my view, it would probably have been more prudent to give the parties an opportunity to weigh in on *Kelo* after it came down. However, the more important problem with the panel’s decision was its seriously flawed result, and the way in which it disposed of an important constitutional issue with almost no analysis.

⁴⁷ See Somin, *Testimony*, at 4.

⁴⁸ See *Kelo v. City of New London*, Amicus Br. of NAACP, American Association of Retired Persons, & Southern Christian Leadership Conference, 2004 WL 2811057.